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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 174

PATSY PILLO,

Petitioner,

vs.

STATE OF NEW JERSEY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Patsy Pillo respectfully petitions, by his counsel, Joseph Tomaselli and C. Zachary Seltzer, for a writ of certiorari to review a decision of the Supreme Court of the State of New Jersey, 15 N. J. 99, 104 A2d 50 (March 29, 1954), affirming a previous judgment of conviction of contempt which was reversed by the Appellate Division of the Superior Court of New Jersey, and then after issuance of a *nunc pro tunc* order, affirmed by the same Appellate Division of said Superior Court.

A.

Jurisdiction

The Supreme Court of New Jersey entered its judgment on March 29, 1954. Jurisdiction of this Court is in-

voked under 28 U. S. C. Section 1257, to review a final judgment of the highest court of New Jersey.

B.

Questions Presented

1. Whether petitioner, Patsy Pillo was denied due process of law under the Fourteenth Amendment of the United States Constitution, in the original proceedings before the Judge of the Burlington County Court, attempting to sit in the Superior Court of New Jersey, without authority, and decide a matter not in his court, whereby the petitioner was convicted of having committed criminal contempt against the Superior Court, by a judge who had no jurisdiction.

2. Whether the *nunc pro tunc* order of the Supreme Court of New Jersey, dated August 7, 1953 (R. 85), purporting to confer jurisdiction upon the judge of the Burlington County Court, *nunc pro tunc,* to hear the matters of Patsy Pillo and one, James Christy, charged with Criminal Contempt of Court, is an *ex post facto* law and a bill of attainder contrary to Article 1, Section 10, Paragraph 1 of the United States Constitution, providing that no state shall pass any bill of attainder or *ex post facto* law.

3. Whether the *nunc pro tunc* order of the Supreme Court of New Jersey, denied to petitioner, Patsy Pillo, the equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution.

4. Whether the petitioner, Patsy Pillo, was denied procedural due process as guaranteed by the Fourteenth Amendment of the United States Constitution at the hearing in the contempt matter before County Judge Drenk, both in the order for arrest and in the evidence adduced at the hearing.

5. Whether the Supreme Court of New Jersey, in compelling petitioner to answer the questions before the grand jury (R. 56-64) (11 N. J. 8, 93 A 2d 176) deprived petitioner of the Constitutional privilege against self-incrimination.

C.

Summary Statement of the Matter Involved

A statement in affidavit form was published in a newspaper known as the "Florence Township Post", circulated in Burlington County, in which the affiant, one George Louis Page, alleged that certain public officals of Burlington County had accepted money in exchange for permission granted to other persons to operate gambling games and gambling places. One such gambling place mentioned therein was the Maple Shade Casino, a gambling resort in the Township of Maple Shade, Burlington County (R. 13), which was operated until raided, during June and July, 1949 (R. 17).

The Attorney General promptly caused the Burlington County Grand Jury to commence an investigation of the published charges. George Louis Page, the person who executed the published affidavit, testified as a witness (R. 13) before the Grand Jury on February 25, 1952 and repeated under oath the statements contained in his affidavit. Thereafter, the Grand Jury heard other witnesses, including the petitioner, Patsy Pillo and one James Christy, in connection with the Jury's further investigation of the charges concerning the violation in Burlington County of the gambling laws of New Jersey, and the misconduct of certain public officials in connection therewith.

In response to *subpoenas ad testificandum,* the petitioner, Patsy Pillo, appeared before the Grand Jury on March 18, 1952 (R. 8). The petitioner was duly sworn and various

questions were propounded to him by the Grand Jury, the Attorney General and the Deputy Attorney General. Some of the questions were answered by the petitioner and other questions the petitioner refused to answer upon the ground that their answers would tend to incriminate him. (R. 8.)

Upon verified petition of the Deputy Attorney General (R. 2) to which was annexed an affidavit of the Foreman of the Grand Jury (R. 5), the Superior Court of New Jersey, Law Division, issued an order to show cause (R. 6), returnable April 15, 1952, why the petitioner should not be ordered to answer certain questions, forty-four in number, which he had theretofore refused to answer before the Grand Jury or for refusing to do so, to be adjudged guilty of criminal contempt of Court.

On the return day of the orders to show cause, the State presented the testimony of George Louis Page who testified that he executed the affidavit published in the "Florence Township Post"; that he repeated the charges of the affidavit before the Grand Jury in which he connected one James Christy with the operation of the Maple Shade Casino; but did not recall having similarly connected the defendant Patsy Pillo (R. 13).

Counsel for the petitioner, Pillo, conceded that he should answer questions 2, 3 and 21 (R. 21), and the State agreed (R. 19) that it would not press for answers to questions 4, 10, 12, 14, 15 and 17.

After hearing the arguments of counsel, and considering the briefs submitted, Judge Woods, in the Law Division of the Superior Court, in his conclusions filed June 12, 1952, decided that petitioner should only answer questions 25, 26, 30, 31 and 32, and should be relieved from answering the other questions. An order to that effect was entered on June 19, 1952 (R. 19, 22). The State ap-

pealed the order of the Law Division, Superior Court, to the Appellate Division of the Superior Court (R. 1). The Supreme Court of New Jersey, on its own motion, certified the appeal and itself rendered its opinion on December 8, 1952, reported in 11 N. J. 8, 93 A2d 176, in which the court decided that the order as to Pillo be modified with direction to enter an order directing Pillo to answer all 35 questions in issue except questions 33 and 35 (R. 56).

On December 22, 1952, in accordance with the opinion of the Supreme Court, Judge Woods, of the Law Division, Superior Court, signed an order that petitioner, Patsy Pillo answer all of the questions except questions 33 and 35 (R. 65).

On Monday, December 29, 1952, petitioner appeared before the Grand Jury and was interrogated by the Deputy Attorney General. In the course of the examination, he was asked Questions 2, 3 and 21, which he answered and was also asked Questions 33 and 35, which the Supreme Court had ruled he did not have to answer, as well as three additional questions (R. 67-73) not covered by the order of Judge Woods, one of which was whether he knew Marco Reginelli, and that he answered (R. 73). The others he refused to answer on the ground it would tend to incriminate him.

On December 29, 1952, The Deputy Attorney General, filed a petition entitled in the "Superior Court of New Jersey, Burlington County, Law Division, in the Matter of Patsy Pillo, Charged with Criminal Contempt of Court," and addressed it To The Honorable Elmer B. Woods, Assignment Judge of the New Jersey Superior Court for Burlington County (R. 26). Attached to the petition was a list of questions which defendant had refused to answer (R. 27) with the appropriate numbers as they originally

appeared in the petition of March 31, 1952 (R. 50) set opposite thereto in brackets for convenience of the court. This petition contained a short affidavit of the Deputy Attorney General (R. 53) and an affidavit on information and belief by the Foreman of the Grand Jury (R. 53).

Based upon this petition, the Honorable Lester A. Drenk, Judge of the Burlington County Court, "Assigned", issued an Order of Arrest (R. 30), likewise entitled in the "Superior Court of New Jersey, Law Division, Burlington County, In the Matter of Patsy Pillo, Charged with Criminal Contempt". This Order of Arrest recited that "it further appearing that the said Patsy Pillo was directed to appear and did appear before said Grand Jury on December 29, 1952, at which time the said Patsy Pillo, wilfully, maliciously and unlawfully refused to answer said questions or any of them, thereby contemning the authority and dignity of said Grand Jury and this Court and impeding and obstructing and interfering with the proper and due administration of justice and the Court being of the opinion that the contempt charged against Patsy Pillo may be criminal in its nature" (R. 30).

A warrant for the arrest of defendant was then issued by Judge Drenk, dated December 29, 1952, entitled in the "Superior Court of New Jersey, Burlington County, Law Division", now captioned, however, "State of New Jersey v. Patsy Pillo, Defendant" (R. 31) which warrant was executed on December 29, 1952, by the Sheriff of Burlington and the defendant was incarcerated and compelled to furnish bail (R. 31-32).

Defendant was served with the Petition, but not with the Order of Arrest. The Order was handed to counsel at the hearing of the contempt proceedings on January 12, 1953 (R. 33) and counsel for defendant waived the same only so far as the setting forth of the time of hearing (R. 33). Neither the defendant nor counsel ever saw the warrant.

At the hearing, after moving to amend the petition (R. 34-35), the Deputy Attorney General made a motion that petitioner plead, as in an arraignment, for an answer to the petition and order of arrest (R. 35) and counsel for petitioner objected to the procedure by petition and order of arrest and contended that the normal procedure by petition and order to show cause should have been followed (R. 35) and that there was no order here directed to the petitioner to answer or to present proofs or to show the Court why he should not be guilty of contempt (R. 35-36). Defendant's motion was denied (R. 37) and defendant pleaded "Not Guilty" (R. 37).

The only testimony presented by the State was the witness, Harry T. Perinchief, foreman of the Grand Jury (R. 38) who testified that he was the foreman of the Grand Jury, that it was concerned with the investigation concerning alleged violations of the gambling laws in Burlington County and the misconduct in office of certain public officials in connection therewith and that the term of the Grand Jury had been extended several times (R. 38).

The Deputy Attorney General then offered 5 exhibits which were received in evidence (R. 39-40), including the opinion of the Supreme Court, Exhibit S-3 and the transcript of the partial testimony of witness Patsy Pillo before the Grand Jury on December 29, 1952, which is Exhibit S-5 (R. 66). The State then rested (R. 41).

Counsel for the petitioner then made a motion for dismissal (R. 41-48) which was denied (Book 5, p. 38a). Petitioner offered no testimony and renewed the motion for dismissal at the end of the entire case (Book 5, p. 38a) which motion was again denied (R. 47).

The Court then adjudicated that the petitioner, Patsy Pillo was guilty of criminal contempt (R. 48) and sentenced

the petitioner from one to one and a half years in the New Jersey State Prison (R. 49-50).

This judgment was entered in the judgment records of the "Burlington County Court" (R. 78).

Petitioner then appealed this conviction to the Appellate Division of the Superior Court of New Jersey (Docket No. A-203-52) (R. 25). Among the grounds urged on appeal was that the County Court of Burlington County did not have jurisdiction to hear and adjudicate a contempt proceeding instituted before the Superior Court of New Jersey.

The appeal was duly argued on June 15, 1953, and on July 27, 1953, the Appellate Division, in an unreported decision (R. 79) entitled "State of New Jersey v. Patsy Pillo" (Appellate Division, July 27, 1953, A-203-52) unanimously reversed the conviction, on the ground that "the County Court as a tribunal lacks jurisdiction to hear and determine a charge of criminal contempt arising from the contumacious violation or disobedience of an order of the Law or Chancery Division of the Superior Court" (R. 81). The opinion of the Appellate Division went on further to say:

> "We are also of the opinion that the Judge of a County Court cannot lawfully conduct a trial of a civil or criminal action pending in the Superior Court without auxiliary authorization" (R. 81).

The Mandate of the Appellate Division reversing the conviction issued ten (10) days after July 27, 1953 (R. 83) or on August 6, 1953. On August 17, 1953, the Assistant Deputy Attorney General filed a Petition for Recall of the Mandate and Reconsideration (R. 84), after having obtained a *nunc pro tunc* order signed by the Chief Justice of the Supreme Court of New Jersey, dated August 7, 1953, which temporarily assigned Judge Lester A. Drenk, effective December 29, 1952, to the Law Division of the Superior Court, Burlington County, to preside in causes there pending

entitled "In the Matter of Patsy Pillo, Charged with Criminal Contempt of Court and In the Matter of James Christy, Charged with Criminal Contempt of Court" (R. 85).

On August 27, 1953, the Deputy Attorney General filed and served a Notice of Petition for Certification from the Supreme Court of New Jersey to the Appellate Division of the Superior Court (R. 86).

On September 8, 1953, the Appellate Division entered an order recalling its mandate and ordering the petitioner within ten days to file a supplemental brief limited to a discussion of the validity of the *nunc pro tunc* order (R. 88).

Petitioner filed a supplemental brief raising the question of the constitutionality of the *nunc pro tunc* order, and on October 20, 1953, the Appellate Division rendered its decision reversing itself, on the ground that as an inferior court, it was bound by the *nunc pro tunc* order of the Supreme Court of New Jersey (R. 89) and thereupon authorized the issuance of a new mandate affirming the judgment of conviction (R. 92).

Petitioner then appealed to the Supreme Court of New Jersey (R. 93) on the ground that the Appellate Division, in giving effect to the *nunc pro tunc* order violated his constitutional rights in that it deprived him of liberty without due process of law, and deprived him of the equal protection of the laws contrary to the Fourteenth Amendment of the Constitution of the United States, that said *nunc pro tunc* order is a bill of attainder and an ex post facto law, contrary to the Constitutions both of the United States and the State of New Jersey, and that the Appellate Division, after the mandate had issued and after the petition for certification by the State to the Supreme Court of New Jersey, had no jurisdiction to recall the mandate and reverse its former decision.

The appeal to the Supreme Court of New Jersey was

argued on February 8, 1954, and then reargued on February 23, 1954, and on March 29, 1954, the Supreme Court of New Jersey, in a split decision (5-2) rendered its decision affirming the conviction for contempt on the ground that there was original constitutional authority for the appointment of a County Judge to sit in the Superior Court, and the failure of the petitioner to object to the authority of such judge at the time of hearing, precluded his right to raise the objection to his jurisdiction on the appeal (R. 94).

Petitioner contends that the Supreme Court of New Jersey, in affirming the conviction of petitioner for criminal contempt, has deprived petitioner of due process of law and the equal protection of the law, contrary to the Fourteenth Amendment of the Constitution of the United States, in that he was condemned by a court that lacked jurisdiction, that the requirement that a court attempting to render judgment have jurisdiction is fundamental to due process, that jurisdiction when lacking, cannot be supplied by consent, acquiesence or waiver; that the effect of the *nunc pro tunc* order was to find defendant guilty without an opportunity to present a defense; that the *nunc pro tunc* order upon which the Appellate Division relied in recalling its mandate, was an *ex post facto* law and a bill of attainder; and that the original proceedings before the County Judge, attempting to act for the Superior Court, especially the wording of the Order of Arrest, which adjudicated that petitioner was guilty of contempt before he was tried, was a denial of due process, and in effect an attempt to prejudge the petitioner before the hearing; and that the original decision of the Supreme Court of New Jersey, reported in 11 N.J. 8, 93 A2d 176 (1952), which required petitioner to answer the questions propounded before the grand jury, except for questions 33 and 35, was an unconstitutional attempt to force petitioner to be a witness against himself, and thus lead to possible Federal criminal prosecution that might result from the grand jury inquiry.

D

Reasons Relied on for the Allowance of the Writ

I. THIS PETITION PRESENTS QUESTIONS WHICH ARE IMPORTANT MATTERS OF FEDERAL CONCERN, INVOLVING THE FOURTEENTH AMENDMENT AND THE DECISION OF THE SUPREME COURT OF NEW JERSEY IS IN CONFLICT WITH APPLICABLE PRINCIPLES OF FEDERAL LAW.

A. *The petitioner was denied due process of law guaranteed by the Fourteenth Amendment of the United States Constitution, when he was convicted by a court that did not have jurisdiction.*

The Burlington County Court did not have jurisdiction to try a criminal contempt proceeding in the Law Division of the Superior Court of New Jersey as the Appellate Division of the Superior Court rightly held.

It is essential to due process of law that the court rendering the judgment, should be a legally competent tribunal having jurisdiction of the case. *Powell* v. *Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (U. S. Sup. Ct. 1932). *Maxwell* v. *Goetschius*, 40 N.J.L. 383, 29 Am. Rep. 242 (Sup. Ct. 1878).

Under the Constitution of the State of New Jersey, the County Courts and the Superior Court are separate tribunals. N.J. Const. 1947, Art. VI, Sec. III; Art. VI, Sec. IV. Since they are separate tribunals, neither can hear nor punish for contempts committed against the dignity of the other. That is fundamental. In *Commonwealth, ex rel Shecter* v. *Shecter*, 250 Pa. 282, 95 A 468 (Sup. Ct. of Pa. 1915), it was held that each court is the exclusive judge of contempts committed against its process, and a court has no jurisdiction to attach defendant to answer a charge for contempt in failing to obey an order of another court.

The Supreme Court of New Jersey, in differing with the Appellate Division, in its first decision, overlooked the fact that the Appellate Division held that the Burlington County

Court as a tribunal lacked jurisdiction to hear and determine a charge of criminal contempt arising in the Law or Chancery Division of the Superior Court, and only by way of *dicta* stated that it was also of the opinion that the Judge of the County Court could not lawfully conduct a trial of a civil or criminal action pending in the Superior Court without auxiliary authorization. The Appellate Division, no doubt had in mind the rule of law well fortified by authority, that one court cannot punish a contempt committed in another. Under the Court Rules of New Jersey, and it was the law under the former practice, that where the contempt charged is a violation of an order or judgment of the court, the judge who made the order or judgment is disqualified from presiding at the trial or hearing. (Rule 3:8-2(d) Revised Rules of the Courts of New Jersey, 1953). This requires that another judge hear the contempt, but it must be another judge of the same court, not the judge of another court. A judge of another court has no jurisdiction to hear the contempt. See *Commonwealth* v. *Shecter*, 250 Pa. 282, 95 A. 468 (Sup. Ct. Pa. 1915); 17 C.J.S. Contempt, Sec. 51; *Greene* v. *Edgington*, 37 Idaho 1, 214 Pac. 751 (Sup. Ct. Idaho, 1923); *Roberts* v. *Tatum*, 171 Ark. 148, 283 S.W. 45 (Sup. Ct. Ark. 1926); *Parker* v. *Superior Court Los Angeles County*, 79 Ca. App. 618, 250 Pac. 587 (Dis. Ct. App. 2d Dis. Div. 2, Calif. 1926).

Craig v. *Somers*, 55 N. J. L. 525 (Sup. Ct. N. J., 1893), relied upon by the Supreme Court of New Jersey in its decision, is not applicable, as it does not apply to a contempt proceeding, which is fundamentally a proceeding to vindicate the dignity of the court against which the contempt was committed. Furthermore, this case was decided under the Constitution of 1844, when the right of a judge to preside over a court was determined by the Constitution and the acts of legislature. Under the present constitution of New Jersey, Article XI, Sec. IV, par. 5, the right of a County

judge to sit temporarily in the Superior Court depends upon an express assignment by the Chief Justice of the Supreme Court. This express assignment was lacking. The *nunc pro tunc* order attempting to assign the judge of the Burlington County Court to hear the contempt did not remedy the defect, as the *nunc pro tunc* order was not only inefficacious for this purpose, but was unconstitutional and void. Lacking jurisdiction at the outset, a failure to object at the hearing, to the composition of the court, could not confer jurisdiction by consent upon such court. The court that convicted the petitioner lacked jurisdiction completely, so that a failure to object to the judge at the hearing could not confer jurisdiction on the tribunal by waiver or consent. *McClaughry* v. *Deming*, 186 U. S. 49, 46 L. Ed. 1049, 22 S. Ct. 786 (U. S. Sup. Ct. 1902; *Ex parte Fish*, 184 S. W. 479 (St. Louis Ct. of App. 1916).

Under the New Jersey law as now constituted in view of the new Constitution of 1947 and the Court Rules, a rule of court has the force of an act of the legislature so far as relates to procedural law. *Winberry* v. *Salisbury*, 5 N. J. 240, 74 A2d 406 (Sup. Ct. 1950). *Fischer* v. *Twp. of Bedminster*, 5 N. J. 534, 76 A2d 673 (Sup. Ct. 1950). See *State* v. *Finate*, 13 N. J. Super. 302, 80 A2d 341 (Hudson County Court 1951).

Having no jurisdiction to hear the case, the proceedings before the Judge of the Burlington County Court were *coram non judice*, and void, and neither an act of the Legislature, nor a special order of the Supreme Court, *nunc pro tunc*, could give such a proceeding and the judgment ensuing therefrom, any force or validity. By way of example, in *Maxwell* v. *Goetschius*, 40 N. J. L. 383, 29 Am. Rep. 242 (Sup. Ct. N. J. 1878) it was held that an act of the legislature purporting to validate a sale made on partition proceedings by commissioners in a court having no jurisdiction either over the property or the owners, is nugatory and such

sale is void. Also, the general rule is that the legislature of this State cannot legalize any judicial act that is void for want of jurisdiction. If the legislature of New Jersey cannot by restrospective legislation confer jurisdiction upon a court that had none, then surely the Supreme Court, which represents one of the coordinate branches of State government, cannot by a special order retrospectively affect a proceeding in so vital a matter as authority to hear a case or jurisdiction.

II. THE NEW JERSEY SUPREME COURT DECIDED A QUESTION OF GREAT PUBLIC CONCERN IN GIVING EFFECT TO A NUNC PRO TUNC ORDER PURPORTING TO RESTORE A LACK OF JURISDICTION AND THEREBY SUBJECTING PETITIONER TO AN EX POST FACTO LAW AND BILL OF ATTAINDER CONTRARY TO THE UNITED STATES CONSTITUTION.

A. *The Nunc Pro Tunc Order of the Supreme Court of New Jersey Was an Ex Post Facto Law and a Bill of Attainder and Denied to Petitioner, the Equal Protection of the Law, Under the Constitution of the United States.*

An examination of the record will show that the *nunc pro tunc* order was obtained by the Attorney General of New Jersey without notice to the petitioner's counsel. The purpose here sought to be accomplished by the *nunc pro tunc* order is not one authorized in the law. A *nunc pro tunc* entry in practice is an entry made now of something which was actually previously done, to have effect as of the former date. Its office is not to supply omitted action by the court, but to supply an omission in the record of action really had, but omitted through inadvertence or mistake. *Perkins* v. *Hayward*, 132 Ind. 95, 31 N. E. 670, 672; *In re Peter's Estate*, 51 Pac. 2d 272 (Sup. Ct. Okla. 1935); See *Wood's Pharmacy, Inc.* v. *Kenton*, 50 Ariz. 53, 68 Pac. 2d 705, 706 (Sup. Ct. Ariz. 1937).

On December 29, 1952, the date when the *nunc pro tunc*

order was supposed to be effective, there had been no action by the Supreme Court of New Jersey in assigning Judge Drenk to the Superior Court to hear the two contempt cases.

Any attempt by the Supreme Court of New Jersey to give effect to this *nunc pro tunc* order is to subject the petitioner to a conviction and imprisonment, not by virtue of a judicial proceeding, for the court that passed its judgment had no jurisdiction, but by virtue of a special order of the Supreme Court, conferring upon a Judge who had no jurisdiction, temporary jurisdiction to hear a case, *nunc pro tunc.*

This *nunc pro tunc* order is a bill of attainder.

In *Cummings* v. *State of Missouri,* 4 Wall. 277, (71 U. S. 277), 18 L. Ed. 356 (U. S. Sup. Ct. 1866), this Court said:

> "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties.
>
> "These bills, though generally directed against individuals by name, may be directed against a whole class, and they may inflict punishment absolutely, or may inflict it conditionally."

The *nunc pro tunc* order in this case (R. 85) specifically singles out petitioner Patsy Pillo, and one James Christy, and is directed specifically at them. It is clearly a bill of attainder and invalid as contrary to the Constitution of the United States, Article I, Section 10, paragraph 1, and the Constitution of New Jersey, 1947, Article IV, Section VII, paragraph 3.

The *nunc pro tunc* order is also an *ex post facto* law.

In *State* v. *Finate,* 13 N. J. Super. 302, 80 A2d 341 (Hudson County Court 1951), it was held that:

The constitutional mandate as to *ex post facto* laws is applicable to rules of court when such rules have the effect of law.

Calder v. *Bull*, 3 Dall. 386 (3 U.S. 386) 1 L. Ed. 648, (U. S. Sup. Ct. 1798) while the leading case on the question of *ex post facto* laws, does not contain an exhaustive list of what constitutes an *ex post facto* law.

In *Lindsley* v. *Board of Managers of the New Jersey State Prison*, 107 N. J. L. 51, 151 A 294 (Sup. Ct. N. J. 1930), the court said:

> "The generally accepted classification of an ex post facto law is as follows:
>
> "1. A law which provides for the infliction of punishment upon a person for an act done which, when it was committed, was innocent.
>
> "2. A law which aggravates a crime or makes it greater than when it was committed.
>
> "3. A law that changes the punishment or inflicts a greater punishment than the law annexed to the crime when it was committed.
>
> "4. A law that changes the rule of evidence and receives less or different testimony than was required at the time of the commission of the offense in order to convict the offender. People v. Hayes, 140 N. Y. 484; Calder v. Bull, 3 Dall. 386; 1 Law Ed. 648.
>
> "Other classes sometimes added to the foregoing are:
>
> "5. A law which, assuming to regulate civil rights and remedies only, in effect, imposes a penalty or the deprivation of a right which, when done, was lawful.
>
> "6. A law which deprives persons accused of crime of some lawful protection to which they have become entitled, such as the protection of a former conviction or acquittal or of the proclamation of amnesty. Cooley Const. L. 286.
>
> "Throughout the several jurisdictions variations of and extensions to the foregoing have occurred and such, 'to make the classification sufficiently general to embrace all the laws which have been adjudged ex post facto', have been assembled by 12 C. J. 1101 into a further class, viz: 'Every law which, in relation to the offense or its consequences, alters the situation of a person to his disadvantage.' "

In 16 C. J. S., Constitutional Law, Sec. 44, it is stated:

> "A law which deprives accused person of any substantial right or immunity possessed by him before its passage is ex post facto as to prior offenses. Thus accused persons have been held to have been deprived of substantial rights by retrospective statutes * * * punishing offenses that have been pardoned, or making void convictions valid * * *."

In, *In re Murphy,* 1 Woolw. 141, 17 Fed. Cas. No. 9,947, (Cir. Ct. D. Mo. 1867), defendant was convicted by a military commission in the Fall of 1865, shortly after the Civil War, in a State where the Federal courts were open and functioning. On March 2, 1867 (14 Stat. 432), Congress passed an act validating the acts of the President of the United States respecting martial law and military trials and providing that no federal courts should reverse such proceedings and also protecting from civil proceedings, persons who under the President's orders, had, in striving to suppress the Rebellion rendered themselves amenable to prosecutions. In holding this Act of Congress to be *ex post facto,* the Court said:

> "If this act be valid, the prisoner must be detained. It is evidently intended to make two provisions—the one, to validate the punishment of offenders, which would otherwise be illegal; the other, to protect from civil process the officers and others who, as subordinates of the president, have striven to put down the Rebellion, but whose acts have rendered them amenable to legal proceedings. So far as the first point is concerned, the law is unconstitutional; undoubtedly so. No clearer case of an ex post facto law could be framed. Its effect is to hold men in confinement for offences not punishable at the time they were committed, and to detain such persons in a servitude imposed by a court which had no jurisdiction to try them."

The special *nunc pro tunc* order of the Supreme Court, purporting to have the force of law in this case, is *ex post facto* in that it seeks to validate a conviction and sentence of imprisonment imposed by a Judge of a County Court who had no jurisdiction to try petitioner. It is contrary to Article I, Section 10, paragraph 1 of the Constitution of the United States and Article IV, Section VII, paragraph 3 of the Constitution of New Jersey, 1947.

The *nunc pro tunc* order also deprives the petitioner of due process of law and the equal protection of the law under the Fourteenth Amendment.

The effect of the special *nunc pro tunc* order of the Supreme Court of New Jersey of August 7, 1953, was to deny to petitioner, Patsy Pillo, and one James Christy, the same right that every other litigant has, namely, the right to be tried by a court having jurisdiction of the subject matter of the offense charged.

In so far as the *nunc pro tunc* order seeks to impart validity to the proceedings before the County Judge, it deprives petitioner of the basic essential of due process, namely, a court having jurisdiction, and in singling out petitioner and another upon whom to exercise its force, it deprives the petitioner of the equal protection of the law. *Powell* v. *Alabama,* 287 U. S. 45, 68, 53 S.Ct., 55, 77. L. Ed. 158, 84 A. L. R. 527 (U. S. Sup. Ct. 1932); *Butcher* v. *Maybury,* 8 F2d 155 (U. S. Dis. Ct. 1925).

III. THE PETITIONER WAS DENIED PROCEDURAL DUE PROCESS IN THE MANNER IN WHICH HE WAS BROUGHT INTO COURT AND IN THE CONDUCT OF THE HEARING CONTRARY TO THE FOURTEENTH AMENDMENT.

Counsel for the petitioner objected at the hearing against the manner in which petitioner was brought into court by an order and warrant for arrest, instead of by an order to show cause which would call upon the petitioner to file an answer to the charges, in the ordinary course of

procedure (R. 35). The order of arrest was not served upon the petitioner, but was presented to counsel at the hearing (R. 33). Counsel waived notice of the time of hearing (R. 33), but nothing more.

An examination of the Order of Arrest (R. 30), discloses a flagrant violation of due process. The order in so many words says that petitioner is guilty of contempt; that he "wilfully, maliciously and unlawfully refused to answer said questions or any of them, thereby contemning the authority and dignity of said Grand Jury and this Court and impeding and obstructing and interfering with the proper and due administration of justice and the Court being of the opinion that the contempt charged against Patsy Pillo may be criminal in its nature." Instead of calling upon the petitioner to show cause why he should not be held in contempt, the Order recites that he has committed a contempt and the only question in the court's mind seems to be whether the contempt charged against petitioner is criminal in nature. This, all before the hearing. The transcript of the hearing indicates that petitioner was called upon to plead during the hearing, and the taking of testimony followed immediately after the entry of the plea (R. 37). This is not due process.

The words "due process of law" are equivalent in meaning to the words "law of the land". *Twining* v. *New Jersey*, 211 U. S. 78, 100, 29 S.Ct. 14, 53 L.Ed. 97 (U. S. Sup. Ct. 1908).

"By the law of the land", said Webster, in a much quoted paragraph from the Dartmouth College Case (*Trustees of Dartmouth College* v. *Wodward*) 4 Wheaton 518, 581 (17 U. S. 518), 4 L.Ed. 629 (U. S. Sup. Ct. 1819), "is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that

every citizen shall hold his life, liberty, property and immunities, under the protection of general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures in all possible forms, would be the law of the land. * * *"

A prosecution for criminal contempt is veritably a criminal trial in which the accused possesses most of the substantial rights of a person accused of crime, among which are the presumption of innocence, the burden of proving the alleged guilt beyond a reasonable doubt and the rules of evidence applicable in the trial of an indictment. *Swanson* v. *Swanson,* 10 N. J. Super. 513, 520; 77 A2d 477 (App. Div. 1950). See *Appeal of Verdon,* 91 N.J.L. 491, 104 A 317 (Sup. Ct. 1918); *Zimmerman* v. *Zimmerman,* 12 N. J. Super. 61, 69; 79 A2d 59 (App. Div. 1950); In re *Larkin,* 103 N. J. Eq. 195, 142 A 822 (Ch. 1928); *Oscar Barnett Foundry Co.* v. *Crowe,* 80 N. J. Eq. 109, 74 A 964 (Ch. 1909).

At the hearing, the State produced only one witness, the foreman of the Grand Jury, who testified that he was the foreman, and that the Grand Jury was investigating alleged violations of gambling laws and misconduct in office of certain public officials in connection therewith and that the term of the Grand Jury was extended from time to time. That was all the testimony offered in the case. Then followed the offer and receipt in evidence of Exhibits (R. 50-74) among which was the partial testimony of the witness before the Grand Jury, Exhibit S-5. None of these exhibits established the proof that the defendant, willfully, maliciously, unlawfully and contumaciously refused to answer the questions or that the questions were relevant and material to the matters and

things then under investigation by the Grand Jury as alleged in the petition. The Supreme Court in its Opinion (R. 56) did not say that failure to answer the questions would *ipso facto* constitute a contempt, but necessarily left it open to further proceedings, when it said: "* * * The orders are not adjudications upon charges of criminal contempt. Until the witness refuses to obey a court order directing him to answer there is no basis for a finding of guilt or innocence of criminal contempt."

As to the relevancy of the questions, while the Supreme Court held in its Opinion, that questions of doubtful materiality and relevancy are properly to be resolved in favor of the Grand Jury (R. 59) it is to be remembered that the petition alleges that the questions were relevant and material to the matters then under investigation (R. 26) and the question of materiality and relevancy became a part of the State's case.

Under the New Jersey Statute, N. J. S. 2A:81-4, it is provided as follows:

> "2A:81-4 General Rule. Except as otherwise provided by statute, a witness shall not be excused from answering any questions relevant and material to the issue."

Under N. J. S. 2A:81-4, which states that a witness shall not be excused from answering any questions relevant and material to the issue, the converse proposition must follow, that a witness can be excused from answering questions not relevant or material to the issue. While it may not be for petitioner to say which questions are relevant and material, that fact must be affirmatively proved by the State in order to sustain a conviction of criminal contempt.

The questions listed in the petition of March 31, 1952, (R. 50) which were propounded at the Grand Jury hearing on March 18, 1952, and unanswered, were not given in their chronological order. There was nothing produced before

the court to show with reference to questions that went before or after, how these questions at issue were relevant or material. He who alleges must prove, and it is submitted that the State failed to show, beyond a reasonable doubt that the questions unanswered were material and relevant to the inquiry before the Grand Jury.

The Court at the hearing did not take into consideration that two of the questions asked by the Deputy Attorney General of the defendant at the hearing before the Grand Jury on December 29, 1952, had been ruled out by the Supreme Court although a motion was granted to amend the petition in this respect; and that two more questions were not covered by the Order of the Superior Court, and that a refusal to answer them did not under any circumstances constitute a contempt. Instead, the Court made a general finding that the defendant was guilty of contempt for failure to answer the specific questions as directed by the order of the Court, upon the sole basis that the Supreme Court held that these questions must be answered.

The trial court was completely oblivious to its true function and proper procedure when it expressed itself as follows (R. 43):

> "The Court: Well, of course, it is not for this court to pass upon the propriety of the questions, as I understand this procedure. That has already been done by the Appellate Court. The sole question, as I understand it, before the Court presently is, has the defendant answered the questions in accordance with the Court order entered. If they are the same identical questions, I can't see how this Court can go into the propriety of the questions."

To this, counsel for the defendant disagreed strenuously (R. 43).

There was insufficient proof before the court that the defendant was guilty beyond a reasonable doubt of criminal contempt as charged. The court took the position that mere refusal of the witness to answer the specific questions ordered constituted contempt.

In that posture of the case, the defendant's motions for dismissal should have been granted (R. 41).

IV. THE SUPREME COURT OF NEW JERSEY IN ITS FIRST DECISION COMPELLED THE PETITIONER TO ANSWER QUESTIONS BEFORE THE GRAND JURY WHICH WOULD TEND TO INCRIMINATE HIM AND THEREBY DECIDED THE CASE NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. *The judgment of the Supreme Court compelling petitioner to answer all the questions except questions No. 33 and 35, deprived petitioner of the privilege against self-incrimination guaranteed by the Federal Constitution.*

The Supreme Court of New Jersey based its opinion that petitioner was required to answer the questions and could not assert the privilege against self-incrimination, on the fact that any possible prosecution was barred by the two year statute of limitations, and hence petitioner had nothing to fear from further prosecution. (R. 60, 64.) In this, the court overlooked the fact that there was a further danger from prosecution by the federal authorities in the case of income tax evasion, (not yet barred by the Statute of Limitations) which the answers to these questions would lead. The privilege protects from disclosure not alone answers which, unconnected with other testimony, suffice to convict the witness of a crime. The proper test was laid down by Chief Justice Marshall in *United States* v. *Burr*, 25 Fed. Cas. No. 14,692e, that testimony disclosing any "link" in the "chain which is necessary to convict", "a fact that would form a necessary and essential part of

a crime which is punishable by the laws", cannot be compelled.

One of the latest expositions of the law on self-incrimination by the United States Supreme Court is the case of *Hoffman* v. *U. S.*, 341 U. S. 479, 71 S. Ct. 814, 95 L. Ed. 1118 (U. S. Sup. Ct. 1951).

It has now been established by the *Hoffman* case, *supra*, that to sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The privilege afforded not only extends to answers that would in themselves support a conviction but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute for a crime.

The principle is stated in 58 Am. Jur. Witnesses, Sec. 57, as follows:

> "The principle securing a person against compulsory self-incrimination is liberally construed in order to give the fullest effect to the immunity, and the protection thus afforded adheres to the accused throughout the trial. To make the privilege available, it is not necessary that he show that the testimony which he declines to give is certain to subject him to prosecution, or that it will prove the whole crime, unaided by testimony of others. It is enough to wake the privilege into life that there is a reasonable possibility of prosecution, and that the testimony, although falling short or proving the crime in its entirety, will tend to a conviction when combined with proof of other circumstances which others may supply. If the answer would furnish one link in the chain of evidence which might convict, the witness may properly claim his privilege. In other words, a witness cannot be compelled to disclose any fact which forms a necessary and essential link in a chain of testimony that would be sufficient to convict him of any crime."

Application of the doctrine to specific questions and situations has generally resulted in a dismissal of the contempt charges because of the incriminatory nature of the questions involved. An examination of the specific questions in this case will disclose that they are identical or similar to those already adjudicated in this Court, and decided to be incriminating.

In the case of *U. S.* v. *DiCarlo,* 102 Fed. Supp. 597, 607 (N.D. Ohio, E.D. U.S. Dis. Ct. 1952), the court held:

> "The questions in counts 7 and 8 relate to his alleged business dealings with Aiello and Caputo, who were also considered to be 'muscle men'. Answers to those questions could well furnish links in the chain of evidence involving the defendant in serious violations of State laws. He was not contumacious in refusing to answer them."

A witness does not have to prove that his answers to certain questions would incriminate him to be entitled to his privilege. He needs only to show that his answers are likely to be dangerous to him.

It is for the court to determine, in the first instance, whether incrimination is reasonably possible from any answer the witness may give, but if such possibility exists, then the witness has the absolute right to assert his privilege, which extends to more than the admission of a crime or any element thereof, but bars compulsory disclosure of any fact that tends to incriminate the witness.

Estes v. *Potter,* 183 F. 2d 865, (U. S. Ct. App. 5th Cir. 1950);

Counselman v. *Hitchcock,* 142 U. S. 547, 12 S. Ct. 195. 35 L. Ed. 1110; (U. S. Sup. Ct. 1892);

In re *Willie* (*U. S.* v. *Burr*), 25 Fed. Cas. No. 14,692e;

U. S. v. *Zwillman,* 108 F. 2d 802, 803 (U.S. Cir. Ct. App. 1940).

Judged by these authorities, the decision of the Supreme Court of New Jersey compelling the petitioner to answer the questions was erroneous and deprived the petitioner of his right to assert his privilege against self-incrimination. Especially is this so, where the answers would furnish a link in the chain of evidence which could lead to a conviction in the federal courts. For these reasons the original order compelling the petitioner to answer these questions invaded the constitutional rights of the petitioner and should be reviewed by this court on Certiorari.

Conclusion

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Supreme Court of the State of New Jersey to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Supreme Court of New Jersey be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Dated: June 28, 1954.

PATSY PILLO,

Petitioner.

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(5894)

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Supreme Court of the United States

October Term, 1954

No. 174

PATSY PILLO,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

The petitioner, Patsy Pillo, appeared before the Grand Jury of Burlington County, New Jersey, on March 18, 1952, in response to a subpoena to testify. This Grand Jury was engaged in an investigation of charges that gambling was carried on in Burlington County, New Jersey, and that officials had accepted money in exchange for permission to operate gambling places in that county.

After being duly sworn, the petitioner, Patsy Pillo, refused to answer 44 questions which were propounded to him by members of the Grand Jury and the Deputy Attorney General in charge of the proceedings. A verified petition alleging these facts together with the refusal to testify by the petitioner was presented to the Superior Court of New Jersey, Law Division, whereupon that court made an order directing the defendant to show cause why he should not be ordered to answer said questions. On the return day of this order to show cause, an order was entered directing the defendant to answer only 5 of the questions.

The State appealed to the Appellate Division of the Superior Court of New Jersey from said order and before the appeal was argued, the Supreme Court of New Jersey, on its own motion, certified the appeal to it for the purpose of argument and determination.

On December 8, 1952, the Supreme Court rendered its opinion (*In Re Pillo,* 11 N.J. 8) modifying the order of the Superior Court, Law Division, with direction to said Superior Court to enter an order directing the defendant to answer all but two of the questions involved (*In Re Pillo,* 11 N.J. 8 at 22). In conformity with this opinion, the Superior Court, Law Division, entered an order directing the petitioner to answer the questions.

At the time of the argument of this appeal before the Supreme Court of New Jersey, the question of materiality and relevancy of the questions was raised and decided. The question whether the answers would tend to incriminate the petitioner was also raised and decided. No appeal was taken from the judgment entered in the Supreme Court directing the defendant to answer the questions and deciding the questions of materiality, relevancy and self-incrimination.

After the Superior Court, Law Division, had entered the order consistent with the opinion of the Supreme Court of New Jersey directing the petitioner to answer the questions propounded before the Grand Jury, the petitioner again appeared before the Grand Jury pursuant to such order. He again unequivocally refused to answer any of the questions. Thereupon a petition to punish the defendant for contempt of court for refusal to answer the questions was presented to said Superior Court, Law Division. Under the New Jersey Court Rules (Rule 2:8-2, now Revised Rule 3:8-2), the procedure to punish for contempt is prosecuted on notice to the defendant. The notice may be given in any one of three ways: either orally by the Judge in open court in the presence of the person charged with contempt; or by an order to show cause; or by an order of arrest. Pursuant to said rule, an order of arrest was issued fixing the time and place for hearing the contempt charged in the said petition (R-30).

On the day fixed for hearing, the defendant appeared before the court with his attorney and entered a plea of not guilty. The trial was being conducted by a County Court Judge in the Superior Court. The State proceeded with its proofs, consisting of the testimony of the foreman of the Grand Jury; the petition requesting the Superior Court of New Jersey, Law Division, to direct the defendant to answer the questions; the order of the Superior Court Law Division directing the defendant to answer 5 of said questions; the opinion of the Supreme Court deciding the materiality and relevancy of the questions involved, whether the answers thereto would incriminate the defendant and directing defendant to answer all but two of the questions involved; the order of the Superior Court, Law Division, directing defendant to answer these questions pursuant to the opinion of the Supreme Court of New Jersey; and a transcript of the proceedings before the Grand

Jury wherein the defendant had again appeared and had refused to answer these questions (R-32 to 74).

After the State rested its case, the attorney for petitioner moved for a dismissal of the charges on the sole ground that the proofs submitted by the State were insufficient on which to base a conviction for contempt (R-41–Fol. 75). The court denied this motion for dismissal and gave the petitioner herein an opportunity to proceed in his own behalf (R-47). The attorney for petitioner thereupon stated that there was nothing to answer as far as the petitioner herein was concerned on the posture of the proofs and charges brought against him, and for that reason and at that time, the petitioner rested his case (R-47). No objection was made either before, during or at the end of the trial to the authority of a County Court Judge to hear a Superior Court issue.

The court, at the end of the case, found and adjudicated the petitioner herein guilty of the criminal contempt charge (R-48) and imposed a sentence of confinement in the New Jersey State Prison for a term not exceeding one and one-half years nor less than one year (R-49 to 50).

The petitioner then elected to appeal from such judgment of conviction to the Appellate Division of the Superior Court of New Jersey pursuant to the provisions of the New Jersey Statutes 2A:10-3. Under the provisions of N.J.S. 2A:10-3, a summary conviction and judgment by the Superior Court of New Jersey for contempt is reviewable, both upon the law and the facts, by the Appellate Division of the Superior Court of New Jersey. It is in effect a trial de novo on the merits. No federal constitutional question was raised on this appeal nor was any constitutional question raised at the time of the trial of the charge of criminal contempt in the lower court.

On July 27, 1953, the Appellate Division of the Superior Court reversed the judgment of conviction of criminal

contempt upon the ground that the judge of a county court cannot lawfully conduct a trial of a civil or criminal action pending in the Superior Court without auxiliary authorization and that there was no proof discernible in the record of the auxiliary authority of county court Judge Lester A. Drenk, who heard and determined the charge (R-81 to 82).

Thereafter the State of New Jersey filed a notice of petition to the Supreme Court of New Jersey for certification to the Appellate Division of the Superior Court, to review said final judgment of the Appellate Division entered in favor of the petitioner herein on July 27, 1953 (R-86).

In the meanwhile, on August 7, 1953, the Chief Justice of the Supreme Court entered an order nunc pro tunc, effective December 29, 1952, assigning county court Judge Lester A. Drenk to the Superior Court, Law Division, to preside in the case involving the criminal contempt of the petitioner, as well as in another case (R-85). No separate application was ever made to the Supreme Court of New Jersey to consider or reconsider this action in entering said nunc pro tunc order.

On August 17, 1953, the State of New Jersey presented a petition to the Appellate Division of the Superior Court calling attention to said nunc pro tunc order and praying for a recall of the mandate on reversal previously issued and for a reconsideration of the matter. On September 8, 1953, the Appellate Division of the Superior Court entered an order recalling its mandate on reversal and ordering the record and the proceedings to be remitted to it for reconsideration (R-88).

While the petition for reconsideration was pending in the Appellate Division of the Superior Court and while the petition for certification was pending in the Supreme Court, the Supreme Court of New Jersey granted the State leave to proceed in the Appellate Division of the Superior

Court with its application for reconsideration (R-87). Such leave is necessary under the Rules of Court.

The Appellate Division of the Superior Court, upon reconsideration, affirmed the judgment of conviction of criminal contempt heretofore made of the petitioner in the lower court and issued a mandate in accordance therewith. In the opinion of the Appellate Division, upon petition for reconsideration, that court stated that the sole reason for the previous reversal of the conviction had been the determination in its prior opinion that a judge of the county court could not lawfully conduct a trial in the Superior Court without auxiliary authorization (R-89 to 90), that it would not express any opinion concerning the propriety of the nunc pro tunc order, and that the record as augmented by this order erased the sole reason for the reversal of appellant's conviction in the first instance (R-92). The Appellate Division thereupon affirmed the judgment of the conviction in the lower court.

An appeal was then taken by the petitioner herein to the Supreme Court of New Jersey from this judgment of affirmance entered in the Appellate Division of the Superior Court (R-93).

Upon this appeal the petitioner herein argued that the nunc pro tunc order of August 7, 1953 (R-85) was a bill of attainder and an ex post facto law and that it violated the Fourteenth Amendment in that it deprived the appellant of due process and equal protection of the law. The validity of the nunc pro tunc order and whether it violated any federal constitutional rights of the petitioner was not decided by the Supreme Court of New Jersey in its opinion (R-94 to 99). As a matter of fact, the Supreme Court of New Jersey in this opinion stated that the nunc pro tunc order played no part in the conclusions of that court and that the points raised in the brief of petitioner as to its validity did not need to be considered (R-99). The judgment of the Supreme Court was entered on March 29, 1954. This petition for writ of certiorari is filed to review that judgment.

QUESTIONS PRESENTED

1. Whether a Federal question is involved.

2. Whether this court has jurisdiction to consider the question raised by petitioner respecting self-incrimination. (Set forth in #5 of Questions Presented at page 3 of the Petition for Writ of Certiorari.)

REASONS FOR DENYING THE WRIT

The basic question presented by this petition for writ of certiorari is the right of a Judge of a County Court of the State of New Jersey to try a State Superior Court matter. In this case it involved the right of a County Court Judge to try a petition to punish for contempt filed in the Superior Court of New Jersey.

The writ should be denied upon the following grounds:

1. No federal question was decided nor was any federal question required to be decided by the Supreme Court of New Jersey.

2. The federal questions now raised on this petition formed no part of the decision of the Supreme Court of New Jersey.

3. This Court has no jurisdiction to consider the question of self-incrimination raised in the petition for certiorari. (Petition for Certiorari, page 3, No. 5 of Questions Presented.)

ARGUMENT

POINT I

No Federal Question is Involved. No Federal Question Was Decided Nor Was Any Federal Question Required to be Decided by the State Court.

It is essential to the jurisdiction of this Court that a substantial federal question be raised and decided in the State court proceedings. Review of a State court judgment based upon an adequate and independent non-federal ground will not be granted.

Murdock v. Mayor, etc. of Memphis, 20 Wall. 590, 636
Fox Film Corp. v. Muller, 296 U.S. 207, 210, 56 Sup. Ct. 183, 184
Berea College v. Kentucky, 211 U.S. 45, 53, 29 Sup. Ct. 33, 34

The power of this Court over state judgments is to correct them if they are wrong in their adjudication of federal rights. To do this it must first affirmatively appear that a federal question was decided and that such decision was essential to the disposition of the case. *Herb v. Pitcairn,* 324 U.S. 117, 126, 65 Sup. Ct. 459, 463.

In the present case, the record will show that a federal question was not decided and that such a decision was not essential to the disposition of the case. In fact what actually occurred was that the Supreme Court of New Jersey considered the non-federal question first and this decision took the federal question out of the case, assuming arguendo that it existed in the first place. In effect, the case was disposed of before the federal questions were even reached and a decision of these questions became unnecessary.

In order to better understand the questions which were before the Supreme Court of New Jersey on appeal, a statement of the facts leading up to this appeal, as borne out by the record, is advisable. From this it will be seen that the federal questions raised by the petitioner herein were never considered, did not need to be considered or decided, and in fact the consideration of the non-federal question eliminated the federal questions entirely from the case. The facts demonstrating this result are as follows:

The petitioner herein appeared before the Grand Jury of Burlington County, New Jersey, and refused to answer a number of questions propounded to him. Application was made to the Superior Court of New Jersey, Law Division, for an order to compel him to answer them (R-2 to 4). After an appeal was taken and decided (R-56 to 64), an order dated December 22, 1952, was finally entered in said Superior Court of New Jersey, Law Division, requiring the petitioner to answer all but two of the questions in dispute (R-65). On December 29, 1952, after entry of this order, the petitioner again appeared before the Grand Jury and again refused to answer any of these questions. Whereupon, on the same day, petition was made to the Superior Court of New Jersey, Law Division, to punish the petitioner for contempt of that Court's order dated December 22, 1952, requiring petitioner to answer the questions (R-26 to 27). The hearing on the contempt charge was held by Hon. Lester A. Drenk, Judge of the County Court, on January 12, 1953 (R-32). No objection was made to the right or authority of Judge Drenk, a County Court Judge, to hear a Superior Court matter either before, at, during or at the end of the trial (R-32 to 50). Judgment finding the petitioner guilty of criminal contempt and sentencing him thereon was rendered (R-49 to 50). The next day, January 13, 1953, the petitioner appealed this judgment, both upon the law and the facts,

to the Appellate Division of the Superior Court of New Jersey pursuant to statute (N.J.S. 2A:10-3). This statute authorizes review on appeal to the Appellate Division of the Superior Court both upon the law and the facts. Such review is a trial de novo. *Zimmerman v. Zimmerman,* 12 N.J.Super. 61, 69, 79 Atl. Rep. (2nd) 59, 63.

Upon this appeal, for the first time, the petitioner raised the question of the authority of the County Court Judge to sit in the Superior Court upon a trial of a matter therein. The Appellate Division reversed the conviction upon the ground that a County Court Judge could not conduct a trial in the Superior Court without auxiliary authorization (R-79, 81). Application was thereafter made by the respondent, State of New Jersey, to the Supreme Court for certification to the Appellate Division to review this judgment. Between the time of the judgment and the application for certification, a nunc pro tunc order was entered by the Chief Justice of the Supreme Court (R-85). The entry of this nunc pro tunc order was called to the attention of the Appellate Division by a petition for reconsideration (R-84) and the respondent, State of New Jersey, was given leave by the Supreme Court to proceed in the Appellate Division with its application for reconsideration. Such leave was necessary because the jurisdiction of the case reposed in the Supreme Court under New Jersey Court Rules (Rule 1:5-6, now Revised Rule 1:10-4), by reason of the application for certification under Rule 1:5-5 (now R.R. 1:10-5).

Upon the application for reconsideration in the Appellate Division of the Superior Court, the petitioner herein attempted to question the validity of the nunc pro tunc order upon federal grounds. This was the first time that the petitioner raised any federal question. The Appellate Division, upon reconsideration, reversed its prior judgment and affirmed the conviction of the trial court. The Appellate Division, in its opinion upon reconsideration

(R-89) said that the sole reason it had reversed the conviction of the trial court was because no auxiliary authority had appeared in the record clothing the County Court Judge with authority to preside in the Superior Court (R-90).

The Appellate Division, however, did not consider the federal questions. It did not review or consider the validity or effect of the nunc pro tunc order to which these questions were directed (R-91). It held that such review and relief from its provisions must be sought in the Supreme Court (R-92), and cited the cases of *Wemple v. B. F. Goodrich Co.*, 127 N. J. Equity 333, 12 Atl. Rep. (2nd) 716 and *Kurth v. Maier*, 134 N. J. Equity 511, 36 Atl. Rep. (2nd) 202. These cases hold that the proper remedy is by application to the court which issued the order, in this case the Supreme Court of New Jersey (127 N. J. Equity at 335; 134 N. J. Equity at 512). No such separate application was ever made to the Supreme Court of New Jersey to consider the validity or effect of the nunc pro tunc order.

After judgment was entered in the Appellate Division of the Superior Court affirming the conviction of petitioner in the trial court, the petitioner herein elected to appeal this judgment to the Supreme Court of New Jersey and filed a notice of appeal to said court (R-93).

The record of petitioner on this appeal (termed the Appendix) which was brought before the Supreme Court of New Jersey consisted solely of the opinion of the Appellate Division of the Superior Court dated July 27, 1953, reversing the judgment of conviction in the trial court and other matters which occurred thereafter but which did not relate to the merits of the case before the trial court or to the proceedings before the trial court. They are all printed at R-79 to 93.

Not one part of the original record which was before the Appellate Division on the original appeal from the

trial court and upon which the opinion of the Appellate Division was first based, was brought up by the petitioner herein to the Supreme Court of New Jersey for review. The complete record on appeal from the trial court before the Appellate Division is printed at R-25 to 74, but this record was not presented by the petitioner to the Supreme Court on his appeal. The only objections or grounds urged in the Supreme Court of New Jersey were directed at the validity and effect of the nunc pro tunc order. In effect, therefore, the petitioner did not question his conviction of contempt upon the merits or the facts, but purely upon procedural grounds, to wit: the authority of the County Court Judge to hear the contempt charge in the Superior Court.

The State therefore had to print, as part of the record on appeal, the transcript of the proceedings in the trial court in order for the Supreme Court of New Jersey to have the true picture of what had transpired at the trial before it. This transcript appears at R-32 to 50.

The sole question which needed to be decided on the appeal to the Supreme Court of New Jersey was the jurisdiction of the trial court and the authority of the County Court Judge, ab initio, to sit in the Superior Court. The nunc pro tunc order played no part in this question. The transcript of the proceedings before the trial court were necessary therefore to make this determination, for the State argued that the trial court had jurisdiction, that the County Court Judge was a de facto judge of the Superior Court and that any objection to his sitting in the Superior Court had to be made before, at or during the trial and could not be made for the first time on appeal. Especially where the appeal constituted a trial de novo.

These questions had to first be determined before the question of the effect of the nunc pro tunc order even arose. If the Supreme Court determined that there was

jurisdiction in the Superior Court and that the County Court Judge could sit in the Superior Court, there was no necessity to determine the effect of the nunc pro tunc order at all. This is exactly what the Supreme Court did do (R-94).

The Supreme Court decided that the Superior Court had jurisdiction of the subject matter and that the criminal contempt proceeding was properly brought in that court (R-96). It decided that the County Court Judge was a de facto judge (R-96). It decided that the County Court Judge, having at least a de facto status, the objection to his authority to sit is waived if not made in the court in which he assumes to preside (R-97). It decided that the petitioner could not sit idly by and speculate upon the outcome and if it was adverse, raise the question for the first time on appeal (R-97 to 98). It further stated that the nunc pro tunc order played no part in the conclusions reached by it and that the objections made to said order need not be considered (R-99).

It can clearly be seen from the foregoing that the Supreme Court of New Jersey did not consider nor need to consider any of the federal questions raised by petitioner on the appeal. They were all directed to the validity and effect of a nunc pro tunc order which played no actual part in the case at all.

The petitioner may argue that the nunc pro tunc order did play a part in the Appellate Division of the Superior Court. That it was the basis for its reasoning in the second opinion which affirmed his conviction in the trial court. Be that as it may, the fact of the matter is that it was unnecessary as a ground for decision and if the lower court relied upon a wrong ground or gave a wrong reason, this is not ground for reversal if its conclusion is correct. Where the decision below is correct it must be affirmed by the appellate court even though the lower court gave a wrong reason for its action. *Riley Co. v.*

Commissioner, 311 U. S. 55, 59, 61 Sup. Ct. 95, 97; *Helvering v. Gowran,* 302 U. S. 238, 245, 58 Sup. Ct. 154, 158.

This case was determined in the Supreme Court of New Jersey upon an adequate and independent non-federal ground. No federal question was decided or needed to be decided. The petition for writ of certiorari should therefore be denied.

POINT II

This Court Lacks Jurisdiction to Consider the Question of Self-Incrimination Raised in the Petition for Certiorari.

The question of self-incrimination raised in the petition for certiorari at page 3 (No. 5 of Questions Presented), did not arise on the appeal of this case in the Supreme Court of New Jersey. That question was raised, argued and disposed of by the Supreme Court of New Jersey in the case of *In re Pillo,* 11 N. J. 8, 17, on December 8, 1952. Judgment was entered the same day. No petition for writ of certiorari was ever taken to this Court from that judgment. The time within which to do so has long since expired. Application for a writ of certiorari must be made within the time limited. *Bradford Electric Co. v. Clapper,* 284 U. S. 221, 225, 52 Sup. Ct. 118, 119.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIORARI

DENIED